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In the Supreme Court of the United States

OCTOBER TERM, 1969

MILTON MARGOLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
EDWARD FISCH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals is reported at 407 F. 2d 727 (Pet. 1A-15A).

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1969. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to July 2, 1969, and on June 27, 1969, the petition

was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the judgment of conviction should have been set aside on collateral attack because of allegedly prejudicial publicity before and during the trial.

STATEMENT

In October, 1960, petitioner was convicted in the United States District Court for the Eastern District of Wisconsin on two counts of an indictment which charged the corrupt endeavor to influence the official action of United States District Judge Robert E. Tehan, and of attempting to obstruct justice, both in violation of 18 U.S.C. 1503. A separate indictment, consolidated for trial, which charged attempted bribery of Judge Tehan, resulted in acquittal (6 T. 874-875).[1] The trial judge, Judge Swygert of the Northern District of Indiana, sitting by designation (5 Ex. p. 69), sentenced petitioner to concurrent terms of five years' imprisonment.[2] On direct appeal the

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[1] The record on file with the Clerk of this Court consists of a six-volume trial transcript, designated herein as "T."; a one-volume record of the *voir dire* of the jurors, designated herein as "V."; a one volume record of the present motion, designated herein as "R."; and also an envelope containing consolidated exhibits, segregated into five sections; a defense appendix containing excerpts from the trial testimony; and a one-volume transcript of post-trial motions and sentencing. These designations are in accord with those used by petitioner (Pet. 6).

[2] This sentence was to be served consecutively to the earlier one which had been imposed by Judge Tehan (see *infra*, p. 3).

convictions were affirmed. *Margoles* v. *United States*, 294 F. 2d 371 (C.A. 7), certiorari denied, 368 U.S. 930.

In 1967, petitioner filed his present motion to vacate judgment and sentence, pursuant to 28 U.S.C. 2255. He claimed that prejudicial pretrial publicity, publicity during trial, and the reading of newspapers by jurors deprived him of a fair trial (R. 1-10). In December, 1967, Judge Reynolds, of the Eastern District of Wisconsin, denied the motion without holding an evidentiary hearing, finding that the publicity attending petitioner's indictment and trial was neither massive nor prejudicial, and that the facts alleged by petitioner were insufficient to raise a doubt about the fairness of the trial (R. 64-71; Pet. 15a-22a). A motion to reconsider was denied (R. 102; Pet. 23a). The court of appeals affirmed (407 F. 2d 727; Pet. 1a-15a).

The evidence showed that on June 3, 1960, United States District Judge Robert E. Tehan sentenced petitioner to one year's imprisonment for income tax violations (1 T. 63). Petitioner desired to have his sentence modified so that the imprisonment would be suspended (2 T. 2, 4 T. 440). One Pikofsky, knowing that his neighbor Earl Villmow, a Milwaukee fireman, was friendly with Judge Tehan's son, suggested to Villmow that he might help petitioner get his sentence modified, and that, in turn, Villmow could get a loan he needed to expand and improve his home (4 T. 530). Villmow reported this conversation to Judge Tehan's son and later to Judge Tehan (2 T. 83-89). Judge Tehan called the F.B.I. (1 T. 64) and

on July 3, 1960, Villmow met with F.B.I. agents (3 T. 331). On July 4, Pikofsky called Villmow and urged him to call petitioner. After checking with the F.B.I., Villmow did so (2 T. 88-89). As a result of calls and meetings which followed, on July 12, 1960, petitioner turned over to Villmow a $5,000 Treasury bearer bond, a first installment of planned payments by which petitioner sought to obtain a suspended sentence (2 T. 114-119, 4 T. 440).

When trial commenced in October, 1960, petitioner's retained counsel made no motion for a change of venue, nor did he ask for a continuance on the grounds of prejudicial pretrial publicity. Counsel indicated that the procedure as to questions and challenges of prospective jurors, which the trial court outlined, would be acceptable to the defense (1 T. 10-11). The court questioned the jurors concerning their knowledge of pretrial publicity concerning the case (V. 24-32). Only one juror who served indicated he had formed an opinion (V. 25). The court questioned him further and he was later questioned by petitioner's counsel in some detail. He indicated he would render a proper verdict, based on the law and evidence in the case, without regard to any newspaper articles which he had read (V. 65). All jurors indicated they would commence their service as if they had never heard of the case (V. 49). None of the jurors who served knew Judge Tehan or any member of his family (V. 21), or felt that Judge Tehan's presence as a government witness would cause them "to lean" in favor of the government (V. 48, 54, 69, 84). Defense counsel questioned the jurors individ-

ually (V. 45-52, 55-65, 68-71, 75-78, 83-85, 87, 100), and challenged some, before he stated the jury was acceptable (V. 100-101).

During trial the jury was not sequestered but was told on various occasions that it was not to read any article concerning the case or to view or listen to any broadcasts (V. 80; 1 T. 23, 74-75; 2 T. 138; 5 T. 698; 6 T. 745). The news media reported the trial. Included in the reports was a story that the trial judge had rejected the proffered testimony of one Kraft to the effect that petitioner had asked him to intercede with Judge Tehan so that petitioner would obtain a suspended sentence (4 T. 460-469, 488; 5 T. 595, 598). In calling this story to the attention of the trial court, the defense counsel stated:

> I know your honor told them not to read it [newspaper reports] * * *. My motion is, * * * to examine the jurors and ask each one or all collectively whether any of them read anything in the papers * * * (5 T. 597-598).

In response to the collective inquiry, the jurors indicated they had not read, seen, or heard reports of the trial (5 T. 697). Near the close of the case, most of the jurors received letters, from a then unidentified source, later determined to be petitioner, dealing with informers who profit from the income tax troubles of others. All jurors who received such letters, after ascertaining that it might deal with the case they were participating in, declined to read the balance of the unsigned communication (*e.g.*, 6 T. 763, 767, 777-778). On the next court day the jurors advised the court that they had received letters (6 T. 764).

Each juror was thereafter individually questioned before the trial was permitted to continue, over defense protest that delivery of the letters was cause for mistrial (6 T. 772, 811).

ARGUMENT

The courts below properly concluded that petitioner received a fair trial before an impartial jury, and that there was no reason to set aside a judgment which had been affirmed on appeal. The examination of the jury, in which petitioner's counsel participated, was exhaustive, and occupies approximately one hundred pages on the record. That petitioner's case had aroused the public's interest and the reporting of it had caused one of the jurors to form a preliminary opinion did not impair the integrity of the trial. As this Court has noted, it is sufficient if a juror can lay aside his preliminary opinion and render a verdict based on the evidence presented in court. *Irvin* v. *Dowd*, 366 U.S. 717, 723. In the present case, all jurors selected indicated that they would hear the evidence with an open mind. The fact that petitioner did not challenge for cause any of the jurors selected on the ground of prejudice based on the alleged unfavorable publicity, and that he did not exhaust his peremptory challenges, is clear evidence that his trial counsel did not believe that the pretrial publicity had unfairly influenced the jurors. Moreover, the fact petitioner was found not guilty on one count is strong evidence that the jurors were not biased and had based their opinion as to petitioner's guilt on the evi-

dence admitted in court. See *Dranow* v. *United States*, 307 F. 2d 545, 564 (C.A. 8).

Such publicity as petitioner's case did receive was neither massive nor prejudicial and none of it called for petitioner's conviction.[3] No carnival atmosphere was created by or for the benefit of the press. Cf. *Sheppard* v. *Maxwell*, 384 U.S. 333, 339-345, 358. Here the crime charged was not one of violence and the fact that only two of the many prospective jurors examined (one of whom was permitted by the defense to serve) had formed a preliminary opinion indicates persuasively that the local populace was not excited by the case. Moreover, the jurors selected were properly and repeatedly instructed not to read, view, or listen to news media accounts of the trial. No request for sequestration of the jurors was made. See *Welch* v. *United States*, 371 F. 2d 287 (C.A. 10), certiorari denied, 385 U.S. 957.

Judge Tehan appeared at trial as a witness and testified only briefly as to his imposition of a sentence on petitioner and that he later had a conversation with Villmow, without relating the substance of the conversation. He neither condemned petitioner nor

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[3] Judge Tehan initially declined to make any statement to the press (R. 15). Later, before the trial Judge Tehan found it necessary to write to Villmow's superior, the Milwaukee city fire chief, in praise of Villmow (R. 21, 22, 24). Others associated with law enforcement also praised Villmow's cooperation (Pet. 8-9). This may have been thought necessary in order to protect Villmow's job security. In any event, there is no indication that such pretrial praise of Villmow had any effect on the jurors before or during trial.

praised Villmow. He testified he had known Villmow only briefly and did not know if he was a friend of his son (1 T. 63-64, 69).[4] The only trial praise of Villmow came from defense witness Pikofsky who testified on direct that Villmow and his family "are very fine people" (4 T. 525). Since Judge Tehan was not the trial judge in the present case, and appeared as a rather perfunctory prosecution witness, petitioner's reliance on *In Re Murchison*, 349 U.S. 133, 136 (Pet. 15, 17) is misplaced.

Petitioner contends that the group inquiry of the jurors concerning the report of the profferred Kraft testimony, which was conducted pursuant to his counsel's suggestion, was insufficient (Pet. 20, 22). While the exposure of jurors through news accounts to information that was not admitted at trial may be grounds for reversal, each case rests on its own special facts. *Marshall* v. *United States*, 360 U.S. 310. It was not error to ascertain by a collective inquiry the fact that none of the jurors had been aware of the report. *Pearson* v. *United States*, 378 F. 2d 555, 559-561 (C.A. 5), certiorari denied, 389 U.S. 1039. Only after it has been ascertained that some jurors have violated the instructions of the court regarding news media information, does it become necessary that

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[4] Other reports which petitioner indicates were inaccurate (Pet. 6, 12), such as petitioner's efforts to elude the F.B.I. arresting officers and the scope of the planned payments, had a factual basis. Petitioner was apprehended after he departed his hospital by utilizing the fire-escape (4 T. 417, 423; 5 T. 613, 725), and Villmow testified that figures as large as $30,000 were mentioned in their discussions (2 T. 114).

the jurors be individually examined. See *Rizzo* v. *United States*, 304 F. 2d 810, 815-816 (C.A. 8), certiorari denied, *sub nom. Nafie* v. *United States*, 371 U.S. 890; *Adjmi* v. *United States*, 346 F. 2d 654, 660 (C.A. 5), certiorari denied, 382 U.S. 823.[5] Moreover, while petitioner protests this newspaper reporting of the Kraft testimony (Pet. 12, 14, 20), petitioner gave the same information to the jury when he testified that he had told Villmow that he had sought Kraft's intervention in appealing to Judge Tehan in regard to his sentence (5 T. 675).

After it had been ascertained that the jurors had been the recipients of letters[6] which might have a bearing on the case, the jurors were individually questioned. Each juror stated he had not discussed the substance of the communication with the others, with the foreman explaining that he had busied himself that morning at court with reading his newspaper (6 T. 806; see Pet. 13). Petitioner asserts that this answer dispels "the fantasy that the jurors were insulated from press accounts of the trial" (Pet. 20). Yet, it was this same juror who first called the receipt of the letter to the court's attention (6 T. 764), with-

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[5] *Coppedge* v. *United States*, 272 F. 2d 504 (C.A.D.C.), certiorari denied, 368 U.S. 855 (Pet. 22), on which petitioner relies, involved a failure to question jurors individually after some jurors had indicated, in response to a collective question, that they had read the newspaper reports concerning the progress of the trial.

[6] These letters led to petitioner's subsequent indictment and guilty plea to communicating with jurors in violation of 18 U.S.C. 1504 (see section 4, of the Consolidated exhibits on file with the Court).

out reading it because he thought that the letter might pertain to the case and that such reading would be in violation of the court's instructions (6 T. 763). It is illogical to assume that the juror who declined to read a private communication and called receipt of it to the court's attention would read the public reports concerning the progress of the case. The trial court did not forbid the reading of newspapers, but repeatedly forbade the reading of any article concerning the case. The fact that all jurors who received the letters declined to read them, and that the jurors indicated that they had not learned of the news media account of Kraft's proffered testimony, is persuasive evidence that the jurors were conscientious and were effectively insulated from news media accounts of the trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

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